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In the Supreme Court of the United States

THE LONG ISLAND SAVINGS BANK, FSB and THE LONG ISLAND SAVINGS BANK OF CENTEREACH FSB,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Circuit's decision in this breach-of-contract case vacated petitioners' $436 million judgment against the government because, during the contracting process, an officer represented on behalf of petitioner LISB that it was in compliance with all applicable laws. That same individual actually had a personal conflict of interest that he concealed from petitioners. According to the Federal Circuit, that conflict of interest placed petitioners in violation of a federal banking regulation and rendered the representation of compliance false. The Federal Circuit accordingly held that the contract at issue was void *ab initio* as a matter of federal common law, allowing the government to disregard its reciprocal obligations under the contract even though petitioners' performance was entirely satisfactory. Alternatively, the court held the government's breach of contract excused by petitioners' inaccurate representation because "any degree of fraud is material."

The questions presented are:

1. Whether, as a matter of federal common law, a government contract is void *ab initio* if its formation was induced by a misrepresentation.

2. Whether, as a matter of federal common law, a government contractor commits a breach of contract that is *per se* material — and that accordingly relieves the government of liability on the contract even after it has received and retained the benefits of the contractor's entirely satisfactory performance — if the contractor made either (a) a false statement or (b) a misstatement of fact, even if innocently made, that could have affected the government's decision to enter into the contract.

RULE 14.1(b) STATEMENT

Petitioners are The Long Island Savings Bank, FSB and The Long Island Savings Bank of Centereach FSB, who were plaintiffs and appellees below. The respondent is the United States of America, which was defendant and appellant in the courts below.

RULE 29.6 STATEMENT

Astoria Financial Corp. is the parent corporation of the successor entities of petitioners The Long Island Savings Bank, FSB and The Long Island Savings Bank of Centereach FSB, and is the only publicly held entity that owns more than 10% of the stock of either petitioner.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Federal Circuit decisions, App., *infra*, 1a-37a, and 38a-68a, are reported at 503 F.3d 1234 and 476 F.3d 917. The post-trial opinion of the Court of Federal Claims, App., *infra*, 69a-169a, is reported at 67 Fed. Cl. 616. The opinion of the Court of Federal Claims denying the government's motion for summary judgment and granting petitioners' motion for partial summary judgment, App., *infra*, 170a-198a, is reported at 54 Fed. Cl. 607. The orders of the court of appeals on rehearing, App., *infra*, 199a-200a, and 201a-202a, are unreported.

JURISDICTION

After revising its opinion, the court of appeals entered its judgment on September 13, 2007, and denied rehearing on December 28, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

The Federal Circuit's decision in this breach-of-contract case vacated a $436 million judgment that petitioners won against the United States and ordered that summary judgment instead be entered *in favor* of the government. The court held that petitioners are entitled to *no* relief for the massive injury inflicted upon them by the government's breach of contract because, although petitioners performed their end of the bargain fully and to the government's satisfaction, one of petitioners' officers made a misrepresentation that "tainted" the formation of the contract. This manifestly inequitable decision rests

on two fundamental, closely related interpretations of federal common law, each directly at odds with the contract principles that should define federal law in this area. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 & n.39 (1996).

The Federal Circuit first declared that a government contract is void *ab initio* — disentitling the contractor to *any* recovery under the contract notwithstanding the extent of its performance and injury — if the contract's formation was induced by a fraudulent misrepresentation attributable to the contractor. But as this and many other courts have recognized, a contract induced by a misrepresentation is *not* void *ab initio* — that is, an unenforceable nullity — unless the misstatement prevented the recipient from understanding the contract's essential terms. In all other circumstances, contracts induced by misrepresentation are treated as voidable — *i.e.*, subject to an award of contract damages but otherwise fully enforceable unless the affected party promptly exercises its option to disaffirm (or avoid) the contract when it learns of the misrepresentation.

The difference is fundamental: when a contract is voidable rather than void, courts must strive to return the parties to their respective pre-contract positions. The Federal Circuit's contrary conclusion that a government contract is void *ab initio* whenever the agreement was obtained through misrepresentation disregards this rule, is grossly unfair (particularly where the contractor has discovered and voluntarily disclosed the impropriety), conflicts with the holdings of other courts of appeals, and departs from this Court's precedent.

The Federal Circuit alternatively held that petitioners' assertedly false compliance representation

constituted a *material* breach of its contract with the government and therefore allowed the government to avoid its reciprocal obligations, for two independent reasons: (i) the representation assertedly influenced the government's decision to enter into the contract; and (ii) "any degree of fraud is material as a matter of law." App., *infra*, 33a. But contract law authorities, including other courts of appeals, have consistently recognized that those considerations do not determine whether a contract breach was material. Instead, the materiality inquiry is properly concerned with the effect of the breach on the *performance* promised to the non-breaching party. These courts recognize that a breach is material, in the sense of justifying the cessation of performance by the non-breaching party, only if it actually and substantially deprives the non-breaching party of the expected benefit of its bargain. This rule differs significantly from the Federal Circuit's materiality test, which provides that *any* intentional misrepresentation is treated as a material breach, as are *all* misstatements of fact (even if entirely innocent) that affect the contract's formation, irrespective of whether that conduct had any impact at all on the performance bargained for by the non-breaching party.

These deviations from general contract principles have enormously significant practical consequences. The Federal Circuit's void *ab initio* doctrine nullifies any government contract "tainted" by a fraudulent misstatement attributable to one of the contracting parties. In contrast, the common law would treat these contracts as generally enforceable, although subject to possible disaffirmance, equitable unwinding, or damages claims. The Federal Circuit's materiality standard is equally consequential, allowing parties to a government contract to renounce their

performance obligations in circumstances where the common law would pronounce them still bound, although also entitled to seek any damages flowing from the other party's breach.

Both of these rules, as applied here by the Federal Circuit, would permit the government to disavow its obligations under contracts that the other party already has substantially performed, even where the government has suffered no injury whatsoever. Because this holding departs from law recognized by other courts, threatens to greatly disrupt the government contracting process, and leads to startlingly inequitable results, further review is warranted.

A. The Contract

This dispute arises out of the government's efforts to enlist healthy banks to help resolve the savings-and-loan crisis of the 1980s, and the government's subsequent decision to break a central promise it had made to induce the cooperation of those institutions. See generally *Winstar*, 518 U.S. at 844-58.

In 1982, petitioner Long Island Savings Bank ("LISB") was a "conservatively run, 'plain vanilla' bank" with branches in Queens, Nassau, and Suffolk counties of New York State. App., *infra*, 71a. Unlike many other thrifts of the time, whose financial troubles threatened to expose the federal government to billions of dollars in deposit insurance liability (see *Winstar*, 518 U.S. at 847), LISB was healthy and seeking opportunities to grow in its home market. App., *infra*, 71a-72a. In August 1982, LISB offered to acquire two sizeable thrifts that had been merged by the Federal Savings and Loan Insurance Corpora-

tion ("FSLIC"). *Ibid.* LISB's offer was expressly conditioned on receiving authorization to amortize, on a straight-line basis over a 40-year period, the supervisory goodwill arising from the merger.[1] FSLIC did not immediately respond to this offer (*id.* at 73a), instead launching a nationwide solicitation for potential acquirers. LISB submitted a series of bids, each of which reincorporated the above accounting treatment. This steadfast negotiating position reflected LISB's "overriding goal": "to protect itself from [the failing thrift's] tangible-capital deficit" (*id.* at 75a).

Upon determining that LISB's bid was the "most favorable" of the six it received, FSLIC sold LISB the stock of the failing institution for $100,000 cash consideration. App., *infra*, 76a-77a. As part of the acquisition, FSLIC and LISB concluded an "Assistance Agreement" in August 1983, pursuant to which LISB assumed responsibility for the failing thrift's obligations and agreed to maintain specified levels of net worth. *Id.* at 79a.

In this regard, the parties agreed to LISB's right to record substantial amounts of goodwill on its books and to employ favorable accounting treatment — including straight-line amortization — to that goodwill. App., *infra*, 79a, 108a-120a. The importance of this provision cannot be overstated. As the trial court later found, "[a]bsent the ability to include

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[1] The term "supervisory goodwill" was used to denote the portion of the purchase price of an acquired thrift that exceeded the fair value of its identifiable assets. *Winstar*, 518 U.S. at 848-849. Then-applicable accounting principles "expressly contemplated its application to at least some transactions involving savings and loans." *Id.* at 849.

this massive amount of goodwill [some $625.4 million] in the computation of [the new thrift's] regulatory capital, [the new thrift] would have had a negative net worth of approximately $550 million and, on a consolidated basis, would have overwhelmed [LISB's] retained earnings." *Id.* at 79a. If not for the favorable accounting treatment, the deal could not have been consummated; LISB and the new institution "would immediately have been insolvent under federal standards if goodwill had not counted toward regulatory net worth." *Winstar*, 518 U.S. at 850-851.

The contract had another relevant component: FSLIC's obligations under the Assistance Agreement were conditioned upon receipt of a certificate from LISB's Chairman stating that the "representations and warranties of LISB set forth in § 11(b) are true and substantially correct." Of particular importance here, the Assistance Agreement required LISB to warrant that, except as otherwise disclosed,

> LISB is not in violation of any applicable statutes, regulations or orders of, or any restrictions imposed by, the United States of America or any state, municipality or other political subdivision or any agency of the foregoing public units, regarding the conduct of its business and the ownership of its properties, including, without limitation, all applicable statutes, regulations, orders and restrictions relating to savings and loan associations, equal employment opportunities, employment retirement income security, and environmental standards and controls where such violation would materially and adversely affect LISB's business, operations or condition, financial or otherwise.

App., *infra*, 4a-5a (quoting Assistance Agreement § 11(b)(5)). In addition, the Assistance Agreement required LISB to affirm that it had provided all material information to FSLIC and had not omitted any material fact. *Id.* at 5a (citing Assistance Agreement § 11(b)(9)).

The Assistance Agreement and the certificate were signed by LISB's then-Chairman and CEO, James A. Conway, Jr. Upon completion of this and other pre-conditions, LISB's acquisition of the failed institution, renamed the Long Island Savings Bank of Centerreach, was complete. The rescue quickly proved successful. LISB and Centereach (collectively "the Banks"), operated essentially in tandem by a management team later described by one government regulator as "sterling," App., *infra*, 123a, employed a "very conservative [lending] philosophy" that, over time, reduced the tangible-capital deficit that had previously plagued Centereach. *Id.* at 80a All told, "[b]etween 1983 and 1989, [the Banks] on a consolidated basis increased their total assets from $4.1 billion to $5.3 billion and total deposits from $3.2 billion to $4.4 billion." *Id.* at 81a.

B. The Government's Breach And Its Consequences For The Banks

On August 9, 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, a law that retroactively eliminated the ability of acquiring thrifts to count supervisory goodwill toward capital requirements. *Winstar*, 518 U.S. at 857. As this Court has held, FIRREA breached the government's contracts with financial institutions that had acquired failing thrifts. *Ibid.* In particular, "[t]he impact of FIRREA's new capital requirements upon

institutions that had acquired failed thrifts in exchange for supervisory goodwill was swift and severe." *Ibid.* For the Banks, the effect was catastrophic: FIRREA eliminated $458 million of the approximately $492 million of supervisory goodwill on Centereach's books, effectively abrogating the crucial, bargained-for contract provision that authorized the Banks to amortize this goodwill over a 40-year period. As a consequence, the Banks immediately fell out of compliance with federal regulatory standards. App., *infra*, 82a-83a.

The government thus forced the Banks to embark on a multi-year restructuring effort to achieve compliance with the accounting standards newly mandated by Congress. This effort, carried out under the oversight of the Office of Thrift Supervision ("OTS"), a regulatory agency likewise created by FIRREA, was extensive. The Banks sold off a series of substantial assets — including approximately $1 billion in deposits, several branches, real estate holdings, and a package of underperforming loans — wrote off goodwill, and underwent a conversion to a consolidated stock corporation via a 1994 initial public offering. App., *infra*, 82a-107a. The effort also was tremendously expensive: the Banks spent over $252 million to carry out these measures. *Id.* at 167a-168a. But it ultimately succeeded; by 1994 the Banks had returned to full regulatory compliance under conditions that would permit them to compete in their home metropolitan New York City market. *Id.* at 104a, 132a.

C. Conway's Personal Enrichment Scheme

From December 1982 to June 1992, Conway served as LISB's Chairman and CEO. During this period, Conway also served as a partner and stock-

holder of a New York law firm that did considerable business with the Banks. App., *infra*, 172a. In fact, from 1982 to 1991, Conway's firm served as the primary mortgage loan closing counsel for LISB, collecting over $20 million in loan closing fees in the process. *Id.* at 173a. These facts were known to petitioners and were not inconsistent with the representations it had made to the government.

What the Banks did not know — because Conway actively concealed it from both the Banks and the government — was that Conway retained *majority* ownership of the firm and was receiving substantial remuneration derived from these loan closing fees, which comprised a considerable portion of the firm's total revenues. App., *infra*, 173a-174a. Conway had falsely denied that he was receiving income derived from the firm's work for the Banks, instead averring that, though he retained "an interest in a law firm that presently renders services to [LISB]," his compensation was derived solely "from *outside* income of said firm." *Id.* at 174a (emphasis added).

LISB did not become aware of Conway's scheme until 1992, when it was uncovered and (over Conway's objections) revealed by LISB's outside counsel. LISB promptly informed OTS and filed a criminal referral with OTS and other enforcement agencies. After a full investigation, OTS made no findings adverse to the Banks, brought no charges against the Banks, and concluded that the matter had not caused the Banks any out-of-pocket loss. It is undisputed that Conway's conflict neither affected the Banks' performance nor led OTS to conclude that the Banks had violated any applicable regulation or had been managed in anything other than a safe and sound manner. In fact, federal regulators consis-

tently praised the Banks' management. Of the parties to this case, the only ones to suffer even indirect injury from Conway's conduct were *the Banks*, which spent over $1 million in legal fees in connection with the OTS investigation into Conway's conflict. App., *infra*, 174a.

In contrast to the minimal harm to the Banks and the absence of harm to the government, the professional and personal consequences of the conflict for Conway were severe. The OTS proceedings concluded in a cease-and-desist order that barred him from the banking industry and required him to pay the Banks $1.3 million in restitution for their investigation expenses. App., *infra*, 175a. He also was indicted on federal criminal charges, pleading guilty to a misdemeanor offense. *Ibid.* He ultimately was disbarred. See *In re Conway*, 712 N.Y.S.2d 610, 611 (N.Y. App. Div. 2000) (per curiam).

D. Proceedings Below

1. The Court of Federal Claims

The Banks filed the instant action in the Court of Federal Claims ("CFC") in 1992, seeking contract damages for the government's breach or, in the alternative, rescission and *quantum meruit* recovery for benefits conferred on the government. Compl. 31 (prayer for relief ¶2).[2] Conway's conduct did not become a focal point of the government's defense until

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[2] The Banks originally filed suit in the Eastern District of New York on August 15, 1989, seeking, among other things, to rescind the contract and return Centerreach to the government — a remedy that the government repeatedly declined. That suit was voluntarily dismissed prior to the commencement of this action.

2001, some twelve years after petitioners first filed suit. Pointing to Conway's conflict of interest, the government asserted that the Banks' breach-of-contract claims were barred by 28 U.S.C. § 2514, which provides that "[a] claim against the United States" is forfeited by any person who practices a "fraud against the United States in the proof, statement, establishment, or allowance thereof." Additionally, the government argued that Conway's conduct rendered LISB's contract with the government void *ab initio* or, in the alternative, constituted a prior material breach of the contract that excused the government both of its obligation to perform and of all liability for its subsequent breach. These defenses were premised on a single theory: that Conway's illegal conduct placed LISB in violation of at least one federal, state or local law in 1983, when Conway represented LISB's compliance with all applicable laws, and that this "fraud" bars the Banks from obtaining *any* redress for the massive loss caused by the government's breach of contract.

The CFC rejected each of these defenses, finding that (i) Conway had successfully concealed his scheme from LISB, (ii) Conway's knowledge could not properly be imputed to LISB, and (iii) "the contract itself is not tainted by Conway's conflict-of-interest." App. *infra*, 198a. The CFC subsequently held a 24-day trial to resolve outstanding questions of fact relating to liability and damages, resolving almost all of these issues in the Banks' favor and entering judgment against the United States for $435,755,000. *Id.* at 15a.

2. The Federal Circuit

a. On appeal, the government renewed its contention that 28 U.S.C. § 2514 required forfeiture of

the Banks' damages claims, arguing that Conway's 1983 representation that LISB was in compliance with all applicable laws amounted to a fraud "in the proof, statement, establishment or allowance" of the Banks' 1992 contract claim against the United States. The government also argued that Conway's conduct constituted a prior material breach of contract by LISB that absolved the government of all liability for its own breach. Notably, the government did not renew its trial argument that the LISB contract should be deemed void *ab initio*.

The Federal Circuit accepted the government's argument that the Banks' contract claims were forfeit under Section 2514. App., *infra*, 15a. The court reasoned that: (i) LISB's compliance representation was false because Conway's personal conduct made LISB non-compliant as a matter of law with 12 C.F.R. § 563.17, a regulation requiring banking institutions to operate in a "safe and sound" manner, or, at a minimum, that LISB had failed to reveal a fact necessary to make its representation of compliance not misleading; (ii) Conway intended to deceive the government by falsely representing LISB's compliance (although this fact-intensive question had never been tried); and (iii) Conway's intent and knowledge could be imputed to LISB. App., *infra*, 22a-23a. This decision vacated the entire $436 million award and instead granted summary judgment to the government.

The Banks sought rehearing, arguing that the panel had given textually unwarranted breadth to Secton 2514 and had improperly resolved numerous disputed issues of fact and agency law against the Banks. The *en banc* court granted the Banks' peti-

tion "for the limited purpose of returning the case to the merits panel." App., *infra*, 202a.

b. Acting without additional briefing or argument, the panel then issued a revised opinion (App., *infra*, 1a-37a), again denying the Banks any recovery for the government's breach because, in light of Conway's conduct, LISB could not have been operating in a "safe and sound" manner, rendering LISB's representation false. *Id.* at 20a-23a. The panel also reiterated its view that Conway's purported knowledge of this falsity could be imputed to LISB. *Id.* at 23a. But the panel changed its theory of *why* these circumstances absolved the government of liability.

Abandoning its previous reliance on Section 2514, the panel instead concluded that two alternative federal common law rules (the first of which was not addressed in the parties' briefs) defeated the Banks' claims for redress. First, the panel held that a contract is "tainted by fraud" and therefore void *ab initio* whenever "the contractor (a) obtained the contract by (b) knowingly (c) making a false statement," App., *infra*, 20a-21a. The panel found that test satisfied here because LISB's compliance representation was a knowingly false statement that caused or, at a minimum, contributed to, the government's decision to enter into the Assistance Agreement.[3] *Id.* at 24a. Second, and alternatively, the revised opinion con-

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[3] The panel sidestepped the government's failure to raise this argument on appeal, opining that the federal common law issue whether the contract was void *ab initio* was "properly before [the] court," even if not "*explicitly* appealed," because it was "inextricably linked to, and is thus fairly included within," the statutory interpretation question presented by the government's Section 2514 defense. App., *infra*, 18a.

cluded that, "[e]ven if the contract were not void, the doctrine of prior material breach precludes the plaintiffs' breach of contract claim for damages" because Conway's misconduct rendered LISB's compliance representation false. *Id.* at 31a. According to the panel, this false representation was a "failure of performance" that was material for two reasons: because Conway's false statement was at least a contributing factor to the government's decision to enter into the contract,[4] and because, in the Federal Circuit's view, "*any* degree of fraud is material as a matter of law." *Id.* at 33a (emphasis added). For these reasons, the panel concluded, LISB's claim for contract damages was entirely barred. *Id.* at 36a.[5]

REASONS FOR GRANTING THE PETITION

The contract rule applied by the Federal Circuit in this case — and the result it produced here — is perverse. Even assuming that Conway's concealed conflict of interest placed LISB out of compliance with federal rules and therefore made LISB's compliance representation inaccurate, it is undisputed that this error did not injure the government *at all*: LISB performed its end of the contract fully and as promised. Yet the Federal Circuit nevertheless held that Conway's misconduct (which the Banks discov-

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[4] This highly debatable conclusion was reached even though there was no trial of the question.

[5] The panel stated briefly that "contract law provides for other theories of recovery" but gave the point no further consideration because, it said, the Banks sought "only contract damages." App., *infra*, 37a. In fact, the Banks' complaint also sought *quantum meruit* recovery in the amount of their expenses in operating the failed thrift and the reasonable value of benefits that they conferred on the United States. Compl. 31 (prayer for relief ¶ 2).

ered and voluntarily disclosed) automatically allowed the government, which had refused LISB's request for rescission, to disavow its end of the contract *after* LISB had fully performed, leaving LISB remediless for a breach by the government that caused it hundreds of millions of dollars in injury.

Not surprisingly, this holding is inconsistent with decisions of this Court and other courts of appeals. Under the general contract principles that are applied by other courts and should govern here, fraud in the inducement does *not* render a contract void *ab initio* and therefore wholly unenforceable, and a breach of contract is *not* material unless the contracting party has been denied the benefit of its bargain. The Federal Circuit's contrary holding here — which has nationwide effect, given that court's exclusive appellate jurisdiction over all contract claims seeking damages of more than $10,000 from the government — will allow the government to avoid its obligations whenever it can identify even harmless and immaterial irregularities in the contracting process; will lead (as here) to shockingly inequitable results; and, as a consequence, will greatly unsettle the government contracting process. Review by this Court, to correct the Federal Circuit's damaging and poorly considered rule, therefore is urgently needed.

I. THE FEDERAL CIRCUIT'S RULING THAT A GOVERNMENT CONTRACT INDUCED BY FRAUD IS VOID *AB INITIO* IS CONTRARY TO FIRMLY ESTABLISHED PRINCIPLES OF CONTRACT LAW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. A Contract Induced By A Misrepresentation Of Material Fact Is Voidable Rather Than Void.

Whether the Banks' contract with the government is deemed void rather than voidable is a difference worth hundreds of millions of dollars: if it is void the Banks are left without a remedy for the government's breach, while if it is voidable the government could not disaffirm the contract while simultaneously retaining the benefits of the Banks' performance. And the test to distinguish between contracts deemed void *ab initio* and those deemed merely voidable is well settled. A misrepresentation made by one contracting party to another renders a contract void *ab initio* only if, "because of a misrepresentation as to the character or essential terms of a proposed contract, a party does not know or have reasonable opportunity to know of its character or essential terms." Restatement (Second) of Contracts § 163 cmt. a (1981). This type of misrepresentation is commonly described as a "fraud in the factum." See, *e.g.*, *Langley* v. *F.D.I.C.*, 484 U.S. 86, 93 (1987). In such a case, because the deceived party "believe[s] that he is not assenting to any contract or that he is assenting to a contract entirely different from the proposed contract," courts treat the underlying agreement as if it had never existed. Restatement (Second) of Contracts § 163 cmt. a. See also 1 Willis-

ton on Contracts § 1:20 (4th ed. 1990) ("If an agreement is void, it cannot be a contract, for the law will neither give a remedy for its breach nor recognize as a duty its performance.").[6]

The consequences of a misrepresentation that deceives the other party about the circumstances surrounding the formation of the contract, but not about the essential terms of the agreement, are entirely different. "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is *voidable* * * *." Restatement (Second) of Contracts § 164(1) (1981) (emphasis added). See also 1 Corbin on Contracts § 1.6 (1993); 1 Williston on Contracts § 1.20.[7] Unlike a contract that is void *ab initio*, a voidable agreement is generally effective and enforceable (see 1 Williston on Contracts § 1:20), although courts permit the deceived party to avoid or "disaffirm" the

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[6] A classic example posits: "A and B reach an understanding that they will execute a written contract containing terms on which they have agreed. It is properly prepared and is read by B, but A substitutes a writing containing essential terms that are different from those agreed upon and thereby induces B to sign it in the belief that it is the one he has read. B's apparent manifestation of assent is not effective." Restatement (Second) of Contracts § 163 cmt. b, illus. 2.

[7] In the classic example, "A, seeking to induce B to make a contract to sell him goods on credit, tells B that he is C, a well-known millionaire. B is induced by the statement to make the proposed contract with A. B's apparent manifestation of assent is effective. However, the contract is voidable by B * * *." Restatement (Second) of Contracts § 163 cmt. a, illus. 1.

contract if the deceived party affirmatively acts to do so promptly upon learning of the misrepresentation. See, *e.g.*, *Landenburg Thalmann & Co.* v. *Imaging Diagnostic Sys., Inc.*, 176 F. Supp. 2d 199, 204 (S.D.N.Y. 2001) (citing 1 Corbin on Contracts § 1.6).

Avoidance of a voidable contract is a rescissionary remedy, governed by principles of equity, that is intended to return the parties to the position they would have occupied had the contract not been consummated. See Restatement (Second) of Contracts § 164 cmt. a. ("Even if the contract is voidable, exercise of the power of avoidance is subject to the limitations stated * * * on remedies."). Accordingly, where a party "claims that it has been fraudulently induced into entering into a contract and it has successfully proved its claim it cannot void the contract and at the same time continue to keep the benefits under the contract." *Goney* v. *E.I. Du Pont de Nemours & Co.*, 144 F. Supp. 2d 1286, 1290 (M.D. Fla. 2001).

These standards are routinely applied by both federal and state courts. See, *e.g.*, *Sphere Drake Ins. Ltd.* v. *Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2d Cir. 2001) ("[A]n allegation of fraud in the inducement is a defense that renders contracts voidable, but not void."); *Shaw's Supermarkets, Inc.* v. *Delgiacco*, 575 N.E.2d 1115, 1117 (Mass. 1991) ("A contract induced by fraudulent misrepresentations is voidable, not void."). And under these standards, it is plain that LISB's contract with the government should, at worst, have been deemed voidable. Even if made with knowledge of its falsity, the compliance representation did not deceive the government as to the nature and essential terms of the bargain. Accordingly, Conway's compliance representation was not a "fraud in the factum" and, under well nigh uni-

versal principles of contract law, did not render LISB's contract with the government void *ab initio*.

The Federal Circuit did not attempt to reconcile its holding with generally applicable principles of contract law, and did not rely for its rule on the Restatement or the decisions of any other court. Instead, it pointed to its *own* idiosyncratic view of contract law: "*We* have stated that * * * a Government contract tainted by fraud or wrongdoing is void *ab initio*." App., *infra*, 20a (emphasis added; internal quotation marks omitted). As demonstrated, this conclusion is clearly at odds with general contract principles, which reject the view that contracts "tainted" by fraudulent inducement are void *ab initio*. As such, it is equally at odds with this Court's longstanding admonition that, "where Congress has not adopted a different standard, [courts] apply to the construction of government contracts the principles of general contract law." *Priebe & Sons, Inc.* v. *United States*, 332 U.S. 407, 411 (1947). See *Winstar*, 518 U.S. at 895.

B. The Rule That A Government Contract Induced By Fraud Is Void *Ab Initio* Conflicts With Decisions Of Other Courts Of Appeals And Departs From This Court's Precedents.

1. There Is a Multi-Circuit Conflict.

As the Federal Circuit itself acknowledged, the decision below exacerbates a conflict between the Federal and D.C. Circuits over whether a government contract "tainted by fraud" should be deemed void *ab initio* under federal common law. See App., *infra*, 20a & n.2 (noting disagreement expressed in *United States ex rel. Siewick* v. *Jamieson Sci. &*

Eng'g, Inc., 214 F.3d 1372, 1377 (D.C. Cir. 2000)). Both here and in prior cases, the Federal Circuit has answered that question in the affirmative. The D.C. Circuit, as demonstrated by its opinion in *Jamieson*, a False Claims Act case, strongly disagrees. The Fifth Circuit also rejects the view that a voidness doctrine should be incorporated into the federal common law of government contracts. See *Hayes Int'l Corp.* v. *McLucas*, 509 F.2d 247, 263 n.26 (5th Cir. 1975).

In *Jamieson*, a *qui tam* relator advanced substantially the same argument now promoted by the government and adopted by the Federal Circuit. The relator contended that employees of the defendant government contractor had committed violations of 18 U.S.C. § 207, a statute that bars "revolving door" abuses by former government employees. These violations of the statutory conflict of interest rule, the relator argued, were attributable to the contractor, and thus rendered the relevant government contract void *ab initio*. 214 F.3d at 1374, 1376.[8]

The D.C. Circuit squarely rejected this argument, noting that the void *ab initio* label and its consequences are "generally reserved for a handful of contracts that are seen as being in fundamental violation of public policy, such as agreements to do acts that both parties know will constitute a felony, or wagering agreements made in jurisdictions where gambling is illegal." *Jamieson*, 214 F.3d at 1377 (ci-

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[8] In the relator's view, this voidness made the contractor's claims for payments actionable under the False Claims Act because the contractor should have known that it was not entitled to the payments it received for its performance. *Jamieson*, 214 F.3d at 1374, 1376.

tation omitted). The D.C. Circuit declined to expand this category to include contracts "tainted" by fraud, recognizing that doing so would "vastly expand the normally minute group of contracts treated as void." *Id.* at 1377. Moreover, such a rule would deprive *the government* of the "option to treat [such a] contract as fully in effect." *Ibid.* (emphasis omitted). As the D.C. Circuit explained:

> Reasons why the government would wish to preserve that election abound: the officials authorized to decide might regard the violation as minor; they might think that the criminal penalties provide ample punishment of the present violation and deterrence of future ones; they might be concerned that disaffirmance would unduly impede future transactions with the contracting firm (possibly in possession of skills or other resources of exceptional value to the government) or with other potential contractors.

Ibid.

The D.C. Circuit also explained why, policy aside, the Federal Circuit was wrong in its prior statements that "government contracts 'tainted by fraud or wrongdoing' are 'void *ab initio*.'" *Jamieson*, 214 F.3d at 1377 (citing *J.E.T.S., Inc.* v. *United States*, 838 F.2d 1196, 1200 (Fed. Cir. 1988), and *Godley* v. *United States*, 5 F.3d 1473, 1476 (Fed. Cir. 1993)). These decisions purport to follow this Court's opinion in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), a decision that addressed the contract consequences of a conflict of interest created by the criminal conduct of a contractor's employee. But as the D.C. Circuit explained, the *Mississippi Valley* Court did not hold that such a conflict of in-

terest renders the affected contract void *ab initio*. Rather, consistent with general principles of contract law, this Court described the contract as *voidable*, stating that the government had the right to "*disaffirm* a contract which is infected by an illegal conflict of interest." *Jamieson*, 214 F.3d at 1377 (emphasis added) (quoting *Miss. Valley Gen. Co.* at 566). See also Restatement (Second) of Contracts § 7 cmt. b (explaining that "[a]voidance is often referred to as disaffirmance"). The disagreement between the District of Columbia and Federal Circuits on this issue could hardly be more clearly drawn.

Like the D.C. Circuit, the Fifth Circuit has rejected the argument that federal common law should treat government contracts "tainted by fraud" as *void ab initio* — and has likewise rejected the Federal Circuit's view that this Court's decision in *Mississippi Valley* supports the contrary conclusion. In *Hayes International*, an unsuccessful bidder sought to set aside a federal procurement contract, claiming that the winning bidder had violated conflict of interest rules set forth in Department of Defense regulations. 509 F.2d at 248. Citing this Court's decision in *Mississippi Valley*, the plaintiff argued in pertinent part that the alleged conflict of interest should be deemed to have voided the contract. *Id.* at 263 n.26. But the Fifth Circuit disagreed that *Mississippi Valley* justified the "dramatic use of federal equity power" proposed by the plaintiff, concluding, in essence, that this Court's holding in that case represented nothing more than its interpretation of the particular federal statute there at issue. *Ibid.* Accordingly, it refused to develop "a novel 'federal common-law of Government procurement,' premised upon what a court can be persuaded is desirable pro-

curement policy." *Ibid.* This holding, too, cannot be reconciled with the Federal Circuit's approach.

2. The Federal Circuit's Voidness Holding Is Incompatible With Decisions of This Court.

For exactly the reasons identified by the D.C. and Fifth Circuits, this Court's decision in *Mississippi Valley*, rendered in any event "in an era when Supreme Court readiness to infer remedies from criminal statutes was at a high point," *Jamieson*, 214 F.3d at 1377, provides no support for the Federal Circuit's extraordinary holding that Conway's conduct, so tenuously connected to the subject matter of the contract, rendered the Banks' contract with the government void *ab initio*. Moreover, other decisions of this Court, both before and after *Mississippi Valley*, have endorsed the traditional distinction between void and voidable contracts, demonstrating that this rule is fully compatible with federal interests in the enforcement of contract rights.

At least since 1875, this Court has endorsed the rule that non-government contracts affected by an executive's private conflict of interest are not "absolutely void, but * * * are *voidable* at the election of the party whose interest has been so represented by the party claiming under it." *Twin Lick Oil Co.* v. *Marbury*, 91 U.S. 587, 589 (1875) (emphasis added). Accord, *Thomas* v. *Brownville, Ft. Ky. & Pac. R. Co.*, 109 U.S. 522, 524 (1883). More recently, the Court has concluded that this same rule should apply to contracts governed by federal law, holding in *Still* v. *Norfolk & Western Railway*, 368 U.S. 35, 38-39 (1961), that fraudulent inducement rendered a private employment contract voidable, but not void, for purposes of the Federal Employees' Liability Act.

Similarly, the Court applied the traditional rule distinguishing void from voidable contracts in construing 12 U.S.C. § 1823, a statute that governs the validity of contract provisions when the FDIC purchases or otherwise assumes the rights of a party to a private contract. See *Langley*, 484 U.S. at 94 (citing, *inter alia*, Restatement (Second) of Contracts § 163). There, the Court rejected a litigant's argument that allegedly fraudulent misrepresentations about the size or mineral properties of the parcel at issue could constitute a "fraud in the factum" rendering the underlying contract void *ab initio*, reiterating that these statements could "constitute only fraud in the inducement, which renders the note voidable but not void." *Ibid.*

These decisions demonstrate that this Court has consistently adopted and applied the traditional distinction between void and voidable contracts in all manner of cases, including those where important federal interests have been affected by the validity of the contract. Especially given the broad rule that general principles of contract law govern federal contracts, the Federal Circuit's conclusion that federal interests require use of an expansive and non-traditional definition of the circumstances in which a fraud renders a contract void *ab initio* stands in striking tension with this Court's precedents.

II. THE FEDERAL CIRCUIT'S MATERIALITY RULING IS CONTRARY TO FIRMLY ESTABLISHED CONTRACT LAW PRINCIPLES AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The Federal Circuit also went badly astray in holding that the Banks' breach of contract was "material" (App., *infra*, 23a) in a manner that allowed

the government to disregard its contractual obligations rather than being remitted to its damages remedies. In reaching its conclusion, the Federal Circuit identified two circumstances that, it believed, constitute a *per se* material, and therefore voiding, breach of contract. First, it opined that "any degree of fraud is material as a matter of law," and therefore that every fraudulent misstatement uttered during the formation of a contract absolves the recipient of liability for any subsequent breach. *Id.* at 33a. Second, it held that the same result follows if a contracting party made any misstatement at all that caused the other party to enter into the contract, even if the misstatement was not "'wil[l]ful or even negligent.'" *Id.* at 33a n.4. But neither of these tests is derived from general principles of contract law, and neither is compatible with the materiality standards employed by common law courts, espoused by leading commentators, or applied to government contracts by other federal courts of appeals. Here, too, this Court's review is clearly warranted.

A. The Materiality Of A Contract Breach Is Measured By The Degree To Which It Deprives The Non-Breaching Party Of The Expected Benefit Of Its Bargain.

All of the leading contract authorities agree that a primary concern of the materiality inquiry is whether the alleged breach substantially deprived the non-breaching party of the benefit for which it bargained and upon which its promise to perform was therefore premised. Only that kind of grave breach is sufficient to relieve the non-breaching party of the duty to perform as the contract requires. In establishing *per se* tests of materiality that completely disregard the effect of the breach on the per-

formance promised by the breaching party, the Federal Circuit has opened an unwarranted gulf between general contract principles and federal common law.

Restatement (Second) of Contracts § 241(a)-(e) sets forth the generally accepted test for contract materiality. It describes as significant in making this determination "the extent to which the injured party will be deprived of the benefit which he reasonably expected" or "can be adequately compensated for the part of that benefit of which he will be deprived"; "the extent to which the party failing to perform" will "suffer forfeiture" and "the likelihood that the party failing to perform * * * will cure his failure"; and "the extent to which the behavior of the nonperforming party comports with standards of good faith and fair dealing." Individually and in combination, these factors focus on the relationship between the *performance* promised by the parties and the *performance* actually delivered. And appropriately so. For, as the Restatement further explains, the entire purpose of the material breach doctrine, including the rule that the occurrence of a material breach excuses the non-breaching party of its obligation to perform, is to "secure the parties' expectation of an exchange of performances." *Id.* at cmt. b.[9] Thus, a breach that has no impact on the breach-

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[9] See also 10-53 Corbin on Contracts § 946 ("A total breach of contract is a non-performance of duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end."); 23 Williston on Contracts § 63:3 (4th ed. 2002) ("[F]or a breach of contract to be material, it must * * * be one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.") (internal quotation marks omitted); Farnsworth on

ing party's performance is properly regarded as *immaterial*. See *Dick ex rel. Amended Hilbert Residence Main. Trust* v. *Conseco, Inc.*, 458 F.3d 573, 579 (7th Cir. 2006) ("Because Conseco would have suffered no actionable damages should Hilbert fail to perform, it would not have been entitled to sue him for material breach.").

Under this standard, the Banks' alleged breach could not possibly be thought material, nor did the Federal Circuit so suggest. After all, Conway's conduct (a) caused no harm to the government; (b) had no impact on the Banks' performance; (c) would inflict a massive forfeiture on the Banks if deemed material; and (d) was voluntarily disclosed to the government by the Banks in a clear demonstration of good faith. But the Federal Circuit instead applied *per se* rules that entirely disregard the impact of an alleged breach on performance.

B. The Federal Circuit's Materiality Ruling Conflicts With Decisions Of Four Other Circuits.

The First, Fifth, Seventh and Eighth Circuits each have concluded that the performance-focused materiality test set forth in the Restatement (Second) of Contracts § 241 should determine whether the breach of a government contract is sufficiently serious to excuse performance by the non-breaching party. See *Harris* v. *Brownlee*, 477 F.3d 1043, 1047 (8th Cir. 2007) ("Whether a breach of contract is material is measured by examining the 'extent to which the injured party will obtain the substantial benefit

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Contracts § 8.16 (3d ed. 1999) ("Most significant is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected * * *.").

* * * reasonably anticipated.'"); *United States* v. *Baus*, 834 F.2d 1114, 1125 (1st Cir. 1987) ("In determining materiality in federal contract law, courts look to all the circumstances surrounding the contract and the breach and are also guided by general principles of contract law and the Restatement (Second) of Contracts * * *."); *E. Ill. Trust & Sav. Bank* v. *Sanders*, 826 F.2d 615, 616 (7th Cir. 1987); *Ferrell* v. *Sec'y of Def.*, 662 F.2d 1179, 1181 (5th Cir. 1981) (in determining materiality of a breach of contract "the general inquiry is whether the injured party has received substantially what he bargained for in spite of the breach").

In contrast, the Federal Circuit here expressly *rejected* the kind of effects-based materiality test espoused by the Restatement and other courts, instead applying an approach that is settled in (and only in) the Federal Circuit. The Federal Circuit has concluded that "any degree of fraud is material as a matter of law," and has found support for this view in the case law governing the False Statements Act, 18 U.S.C. § 1001 — thus incorporating a federal *criminal* law test of materiality into the federal common law of contracts. *Christopher Village, L.P.* v. *United States*, 360 F.3d 1319, 1336 (Fed. Cir. 2004) ("[T]he test of the materiality of a statement is whether a statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made.") (internal quotation marks omitted).

But the materiality inquiry serves distinctly different purposes in these two bodies of law. The materiality standard applied under the False Statements Act and elsewhere in the criminal law distinguishes between statements that are, and are not,

significant enough to merit punishment. See generally *United States* v. *DiFonzo*, 603 F.2d 1260, 1266 (7th Cir. 1979). In contrast, irrespective of materiality, "[e]very breach gives rise to a claim for damages" (Restatement (Second) of Contracts § 236 cmt. a) if injury has been suffered. As such, contract materiality does not differentiate between actionable and non-actionable breaches. Instead, it addresses the very different remedial question, entirely foreign to the criminal law, whether the non-breaching party is entitled to halt his promised performance. Adopting the criminal law's definition of materiality to resolve this quintessential contracts question is directly contrary to this Court's instruction that general principles of contract law must govern federal law in this area.[10] *Winstar*, 518 U.S. at 895 & n.39. Accordingly, review of the Federal Circuit's materiality ruling, too, is plainly warranted.

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[10] The Federal Circuit also failed to recognize that, even when a prior material breach occurs, it does not necessarily "preclude" the breaching party's claim for contract damages. Rather, even when the occurrence of a material breach discharges the non-breaching party's obligation to perform, "the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach." Restatement (Second) of Contracts § 374(1). Accord, *e.g.*, *Fid.& Deposit Co.* v. *Rotec Indus. Inc.*, 392 F.3d 944, 946 (7th Cir. 2004); *Kutzin* v. *Pirnie*, 591 A.2d 932, 937 (N.J. 1991). Here, it is undisputed that Conway's conduct caused the government no loss whatsoever. Accordingly, even if their breach were somehow material, the Banks would still be entitled to restitutionary recovery in the full amount of the benefit they conferred on the government.

III. THE FEDERAL CIRCUIT'S ABERRANT CONTRACT RULES WILL HAVE SIGNIFICANT AND PERNICIOUS CONSEQUENCES FOR THE GOVERNMENT CONTRACTING PROCESS.

The need for review is especially acute because, apart from creating two intercircuit conflicts, the Federal Circuit's departure from settled principles of contract law will have significant and far-reaching practical consequences. The decision below announces that, if a government contractor or its agent makes any misrepresentation of fact during the formation of the contract, no matter how far removed from the contract's central purpose, the contractor stands to forfeit its entire performance, no matter how full, honest, and satisfactory. Wholly apart from its plain inconsistency with general contract principles and decisions of this and other courts, this error has great real-world significance.

First, the Federal Circuit's approach applies a sweeping and inequitable forfeiture rule to *every* substantial contract claim for damages against the United States, *every one* of which must be filed in a forum under the Federal Circuit's appellate jurisdiction. See 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (CFC given exclusive jurisdiction over contract claims against the United States exceeding $10,000); 28 U.S.C. § 1295(a)(10) & (b) (Federal Circuit given exclusive jurisdiction over appeals from Boards of Contract Appeals). Under the Federal Circuit's rule, the United States may retain the benefits of a contractor's performance after learning of a misrepresentation, even as it disavows its own obligations under the contract. This is a patently inequitable result. Consider, for example, a manufacturer that contracts

with the government to build a $436 million warplane, which it delivers, meeting the government's specifications in every respect. Before collecting payment, however, the contractor discovers and reports that one of its officers had a previously unknown conflict regarding some other transaction, the existence of which was inconsistent with the contractor's representation that it was in compliance with *all* federal, state and local laws and rules. Under the holding below, that "fraud" would allow the government to retain the warplane yet breach its obligation to make payment, notwithstanding the contractor's good-faith performance.

This sort of outcome, which one commentator has labeled a "stunningly harsh result" that "fails to articulate any policy rationale for extending prior precedent," Jerry Stouck, *Feature Comment: The Federal Circuit Reaffirms Its Hostility to "Fraud," A Term It Applies Broadly, With A New And Completely Revised Opinion In* Long Island Savings Bank v. U.S., 49 THE GOVERNMENT CONTRACTOR ¶ 401, at 1, 6 (Oct. 24, 2007), will undermine the process of government contracting, with baleful consequences for both private contractors and the United States. "Virtually every major government contract requirement contains a separate certification provision," 3-18 Federal Contract Management ¶ 18.11[1], many of which are similar in breadth to the representation offered by LISB. See, *e.g.*, *United States ex rel. Hopper* v. *Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996) (school district certified that it would "meet all applicable requirements of state and federal laws and regulations"). Yet even a business that makes every effort to ensure that it is in compliance with every law to which it is subject will sometimes learn after the fact that its practices do not comport with

some legal requirement. Moreover, almost by definition, no enterprise can ever achieve absolute certainty that a *concealed* act of one of its officers or employees has not placed it in violation of some federal, state, or local law.

Given this reality, the Federal Circuit's forfeiture rule will be understood to place contractors substantially at the government's mercy.[11] As a consequence, and given the number and scope of technical requirements included in virtually all government contracts, this new forfeiture risk may well be too great for many would-be government contractors to bear. At a minimum, the risk will decrease the competition for and increase the cost of government contracts. Such an outcome is inevitable; the next time (to offer one of many possible examples) the government seeks the assistance of private institutions in addressing a financial crisis, potential bidders will think long and hard about LISB's experience in this case.

Second, such an outcome is not necessary to protect the interests of the United States, which may address fraud through many other common law and

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[11] This is not a fanciful concern. As Judge Jones noted in similar circumstances, "were a court to hold that any kind of government certification required in connection with federal government payment and reimbursement vouchers is material as a matter of law, the government could erase the crucial distinction between 'punitive' [False Claims Act] liability and ordinary breaches of contract by the simple expedient of requiring broad, boilerplate certifications." *United States* v. *Southland Mgmt. Corp.*, 326 F.3d 669, 680 (5th Cir. 2003) (Jones, J., specially concurring) (footnote omitted).

statutory remedies, both civil and criminal. Nor does the Federal Circuit's rule advance any intelligible anti-fraud policy; to the contrary, the holding below will, if anything, discourage voluntary disclosure of conflicts and other misconduct, even as the government *encourages* voluntary disclosure of violations.[12] Contractors should not be subjected to this sort of Catch-22. Moreover, as the D.C. Circuit noted, a rule *requiring* that contracts be declared void often will not be in the government's interest. *Jamieson*, 214 F.3d at 1377.

Finally, the need for review is not diminished by the Federal Circuit's opaque suggestion, evidently referring to the possibility of *quantum meruit* relief, that "contract law provides for other theories of recovery." App., *infra*, 37a. In fact, the CFC lacks jurisdiction to grant implied-in-law remedies like quantum meruit that ordinarily are available when recovery on a contract is not. See, *e.g.*, *Hercules, Inc.* v. *United States*, 516 U.S. 417, 424 (1996) (the CFC's jurisdiction does not extend to implied-in-law contracts, which are a "fiction of law where a promise is imputed to perform a legal duty"; rather, it is limited

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[12] Government contractors with contracts in excess of $5 million and a performance period of at least 120 days, except for commercial item contracts and contracts performed entirely outside the United States, are required to have in place a business code of ethics and an internal control system. See Federal Acquisition Regulation 3.1003; 3.1004(a) and 52.203-13. The internal control system must facilitate timely discovery of improper conduct in connection with government contracts and ensure corrective measures are promptly instituted and carried out. Many contractors also have voluntary disclosure programs, which are intended to promote early detection and correction of improper conduct by contractor relating to a government contract.

to the enforcement of express and implied-in-fact contracts, the latter being "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding") (internal quotation marks omitted). Accordingly, the Federal Circuit's hint that future contractors whose contracts are voided by its Draconian forfeiture rules may obtain at least some alternative relief is illusory; the only court empowered to entertain a contract claim for more than $10,000 against the government lacks authority to offer the contractor relief in any other form.

In any event, the fundamental point is that "'[t]he United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.'" *Perry* v. *United States*, 294 U.S. 330, 351 (1935) (quoting *Union Pac. R.R.* v. *United States*, 99 U.S. 700, 719 (1878)). And when the United States breaches its obligations, the consequences for the parties are to be governed by general principles of contract law, not *sui generis* contract rules devised by the Federal Circuit. See, *e.g.*, *Winstar*, *supra*. The Federal Circuit's departure from these principles, occurring in an area where its jurisdiction is exclusive and its holding has legal consequences of national significance — and involving a case where the government's breach of contract cost petitioners almost half a billion dollars — warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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